

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III
No. 34496-7-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MICHAEL NELSON PECK,

Defendant/Appellant

Second Amended Respondent's Brief

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I. ASSIGNMENTS OF ERROR

A. The trial court did not abuse its discretion in denying authorization for a defense forensic media expert.

1. Appellant Peck's counsel did not establish that such services were necessary as required under CrR 3.1(f)(1) despite having been given the opportunity to do so.
2. As Appellant Peck cannot show that the authorization for a defense forensic media expert was necessary, the trial court's denial of such does not rise to the level of constitutional magnitude.
3. Appellant Peck cannot show that the admission of exhibit Plaintiff's Ex. 30 detrimentally contributed to the jury's verdict.

B. Written findings of fact and conclusions of law regarding Appellant Peck's CrR 3.6 motion to suppress have now been entered and this issue is now moot.

C. The trial court did not err in denying a motion to suppress physical evidence, *i.e.*, the contents of the black cd case which **Mr. Peck claimed no** ownership interest in.

II. ISSUES PRESENTED

- A. Did the court consider more than just the financial aspect of appointing a forensic media expert before it denied Appellant Peck's motion? Answer: Yes.
- B. **Is remand necessary for the court to enter written findings of fact and conclusions of law on Appellant's motion to suppress under CrR 3.6?**
Answer: No.
- C. Was the court correct in not suppressing the inventory search of the black cd case found in the stolen vehicle, when **Mr. Peck did not claim ownership of the item, and when specifically asked, did identify other items as being his property?** Answer: Yes.

III. STATEMENT OF THE CASE¹

On January 23, 2016, Clark Tellvik and Michael Peck drove a recently stolen vehicle down the unplowed driveway of a Kittitas County rural residence belonging to Laura Poulter. RP 28, 100, 228, 234, 283, 315.

¹ In reviewing Appellant's Motion to Strike or Return Amended Brief, it appears that Respondent's first amended brief filed on June 27, 2017, contained two factual errors which are now corrected in this brief, Respondent's second amended brief; 1) the inventory search of the vehicle in which the two men arrived at the Poulter' property, appears to have occurred prior to the tow truck removing the vehicle from the property; and 2) Mr. Peck did not affirmatively deny ownership of the black cd case in which the methamphetamine was found, but rather affirmatively asserted ownership of other property when asked by law enforcement as to whether any of the items in the stolen truck belonged to him. Furthermore, citations to the record have been provided in those locations as requested by Appellant. All corrections and additions within this, Respondent's second amended brief, as referenced *supra.*, are highlighted in bold.

Ms. Poulter, who had just had a video surveillance system installed at her property by an individual who had done similar work for her at her businesses, was in Cle Elum at approximately one a.m. when Clark Tellvik and Michael Peck arrived at her residence. RP 231, 235. Telling a friend about her new system, Ms. Poulter pulled up the live feed which she was able to view through an app on her phone. RP 235. Ms. Poulter was surprised to see two individuals, neither of whom she knew on her property. *Ibid.* Ms. Poulter watched as the person subsequently identified as Mr. Tellvik, approached the front door and first knocked, and then rang the doorbell. RP 280. She could hear her dogs barking, and saw Mr. Tellvik peek in through the top of the glass door. *Ibid.* It appeared to Ms. Poulter that the truck that the two men had arrived in was stuck in the snow. RP 283, 284. Because she was upset by what she was viewing, Ms. Poulter asked her friend to call 911 and then began the approximately 20 minute return trip to her home. RP 237, 238. When Ms. Poulter arrived home, she saw the shed door open, as well as the door to her shop, and believed that the car battery and bag of tools in the back of the stolen truck the two men had arrived in were hers and had been previously

located in the shop. RP 228, 262, 263, 265, 269, 270, 282, 283, 285, 318.

Kittitas County Sheriff's Office Deputy Dan Kivi testified that it was unusual to be dispatched as an event was actually occurring and under observation. RP 305. He and Corporal Green were the first two officers to arrive at the Poulter residence, followed closely by Deputies McKean and Rickey. Uncertain of how many individuals were at the scene, although they had been told two, law enforcement detained Mr. Tellvik and Mr. Peck while searching the property. The truck that the two men had arrived in had a broken rear window, as well as a screwdriver in its ignition and soon returned as having been stolen the day before in Yakima. RP 108, 383. Within the truck, deputies found a GPS unit, two cellphones and a black cd case under the passenger side seat. RP 417, 418. In the bed, law enforcement located a car battery and a bag of tools. When asked, **Mr. Peck** indicated that the phones in the truck were theirs². RP 63. Mr. Peck stated that the car battery and bag of tools within the bed of the truck was his, and neither man

² It is unclear whether or not either of the two men claimed ownership of the GPS system located within the truck. A search warrant was obtained and executed for both the phones and the GPS unit without any evidentiary results. RP 366.

claimed ownership of the black cd case despite being specifically asked. **RP 37, 63, 79-82, 524, 533, 592.** Mr. Peck stated that he brought the car battery and tools as Mr. Tellvik had indicated to him that the truck was not running well. *Ibid.*

Law enforcement did not immediately observe any break-in activity on the property. It was not until Ms. Poulter arrived and pointed out the open outbuildings which had been closed at her departure, that the deputies observed the fresh damage to the door of the shop. **RP 313.** Upon entering the shop, deputies also observed wet spots on the flooring. **RP 317, 527.** Ms. Poulter kept antiques and heirlooms within her shop, as well as a collector Camaro. **RP 263, 317.** It was the missing battery to the Camaro that Ms. Poulter believed that she recognized within the bed of the stolen truck. **RP 318,**

The black zippered cd case, opened in the course of a subsequent inventory search, contained individual bags of different sizes containing methamphetamine and weighing 74.18 grams including its packaging. **RP 431, 483.** Also located within the cd case were digital scales and a glass smoking pipe, the latter of which also tested positive for methamphetamine. **RP 109, 421-422, 486, 567.** The scales were not tested. **RP 567.**

The men told law enforcement that they had each had a dispute with their respective girlfriends earlier in the evening, and had decided to drive from Yakima to the casino in Ellensburg. RP 33, 520. On their way back to the highway, the two men got “lost.” RP 32, 522, 532. Rather than drive back towards the interchange where the casino was located or on towards the lights of Ellensburg, Mr. Tellvik drove the stolen vehicle down the long unplowed driveway of Ms. Poulter’s four acre property. RP 228, 234, 330, 504, 506, 521, 522. Mr. Tellvik initially told Corporal Green both that he had pulled in to turn around and then changed his story to say that he had pulled in to ask for directions. RP 522.

Mr. Peck’s girlfriend testified that the defendant took the battery and tools with him when Mr. Tellvik picked him up as he took tools “with him usually when he – goes anywhere, just in case they break down or something –.” RP 592. The owner of the truck, Shawn McCarthy, testified that there had been nothing wrong with the battery either before the truck was stolen or after it had been recovered. RP 668, 669. The deputies could tell that the truck had been driven to numerous locations on the property before getting stuck. This was evidenced by both the video

footage, as well as the distinctive tire tracks left by the vehicle's racing "slicks", *i.e.*, tires. RP 313, 335, 353, 383, 471, 411, 353.

After Ms. Poulter arrived home, she and law enforcement were able to pull up video which had captured some of the men's activity on her property. They were able to observe Mr. Tellvik unsuccessfully attempt entry into the shop, then run back to the truck, obtain a pry bar, jimmy the shop door, and enter. RP 321 344. A 15" blue pry bar was located outside the driver's door of the men's truck covered with a thin layer of snow. RP 319, 414, 529.

Later that same day, two events occurred: 1) Ms. Poulter's neighbor kindly plowed her driveway compacting the snow and ice where the truck had been stuck; and 2) Ms. Poulter watched the video feeds (three in all) in their entirety and saw Mr. Tellvik drop an item which she believed to be a gun, and then with his foot, cover it with snow, and then drop a second item, and again with his foot, cover it with snow. RP 274, 276, 543.

Ms. Poulter contacted law enforcement and informed them of what she had seen. She also called Troy Schlaitzer, the man who had installed the cameras to ask if he could download the video footage for law enforcement. RP 268, 276, 322.

The next day, Deputy Kivi and Corporal Green went to Ms. Poulter's home to watch the segment of video in which she believed she had seen Mr. Tellvik drop the gun. Deputy Kivi attempted to use one of Ms. Poulter's large crowbars in the general area, but due to the compact nature of the snow and ice, was unable to locate anything. He and Corporal Green believed that the footage was Mr. Tellvik dropping the pry bar and looked no further. RP 322.

However, still believing she had seen a gun, Ms. Poulter again contacted law enforcement the next day. RP 276. Deputy Vraves then went to Ms. Poulter's home on January 25, 2016. RP 554. Deputy Vraves testified that he watched the video with Ms. Poulter and was able to see an individual by the driver's door "kneel down and put something in the snow, and then kick snow over it, kind of stomp on it, as one of our patrol vehicles pulls into the driveway." RP 543. In response to the prosecutor's question, Deputy Vraves stated that he saw this individual perform this activity twice. *Ibid.*

Deputy Vraves went to the location where he believed the truck to have been and immediately realized that the area had been plowed, packing the snow. RP 544. Since it was as the

deputy put it, somewhat like finding a needle in a haystack, he called a friend who owned a metal detector. RP 543, 544. Using the metal detector, in an area consistent with what he'd observed on the video, he and Deputy Goeman were able to find a plowed location, where using his foot to chip at the snow and ice, Deputy Vraves was able to make out the outline of a black item, which was eventually determined to be a gun. RP 544-547. Pictures were taken of the weapon when it was located at the scene on January 25, 2016, two days after Mr. Tellvik and Mr. Peck were located on Ms. Poulter's property. RP 547, 554. The weapon, a Kel-Tec 9 mm contained a loaded magazine. RP 549, 550. Kyle Osborne, testified that he was the gun owner; that it had gone missing August of 2015, around the time that his camp trailer had been broken into, but that he had not reported it stolen as he was uncertain as to whether it had been in the trailer and taken, or merely mislaid. RP 393-396. Mr. Osborne testified that the gun worked both before the burglary and after he'd received it back. RP 396.

Ms. Poulter testified that the video from her property accurately depicted the scene of her property and what she had observed. RP 277.

Terry Schlaitzer testified that he was experienced with custom audio and video, data networking, and surveillance. RP 287. He had installed Ms. Poulter's system on January 21st, and 22nd, just preceding the incident. RP 288. He testified that in retrieving the footage, his "job was to find the data and move it into a common folder, and then that data was then put onto a thumb drive and handed over to the police." RP 290. He also testified that the data was not corrupted. *Ibid.* He explained that the cameras had parameters set for sensitivity and were triggered if a certain percentage of that square were turned to white by either light or movement. RP 293. Mr. Schlaitzer testified that pixels can be enlarged without either distorting or changing the video. RP 299. He had remotely downloaded the material and believed that a forensic analysis of the footage would show that it had not been either manipulated or modified. RP 294, 301, 302.

Deputy Martin testified that he had over 300 hours of specialized training in computer forensics and video. RP 346. He had received the video from Ms. Poulter on thumb drives on

“cohesive time frame of everybody that was there.” RP 347.

Deputy Martin reviewed it for accuracy himself and with the other deputies. RP 349. Deputy Martin testified that:

“[t]here were some frames that did not come over. Whether it was because of the video system and her laptop that was trying to absorb all the information from all three cameras, not sure some frames were corrupted, that did not copy over.” RP 355.

He went on to state that he had gone to Ms. Poulter’s residence:

“—I cannot remember the exact date – and retrieved video footage actually from the SD card, the micro SD card that is in the camera. She had problems with her laptop that was actually recording all of the data that was coming in from the cameras. It was just too much data for her laptop to record. Some footage were missing was footage of the deputies who went out to – retrieved the dropped items—

Prosecutor: Okay.

Deputy Martin: -- that were in the footage -- in this footage, here. I went back out to the house and assisted Ms. Poulter in extracting the micro SD card from the camera in the carport, which actually did hold the data and the video of the deputies retrieving the dropped items. Or (inaudible).” RP 368.

Deputy Martin had the deputies look at the retrieved video and testified that it accurately depicted the scene. RP 368, 369.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING AUTHORIZATION FOR A DEFENSE FORENSIC EXPERT.

1. APPELLANT PECK'S COUNSEL DID NOT ESTABLISH THAT SUCH SERVICES WERE NECESSARY AS REQUIRED UNDER CrR 3.1(f)(1) DESPITE HAVING BEEN GIVEN THE OPPORTUNITY TO DO SO.

CrR 3.1(f) addresses the defendant's right to Services Other Than a Lawyer.

CrR 3.1(f)(1) provides that:

A lawyer for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in this case may request them by a motion to the court.

Mr. Peck is correct that denial of such services cannot be based solely on financial expense. However the following exchange between the court and counsel indicates that it was only a tangential consideration of the trial court.

Ms. Powers: (attorney for Peck) making a motion for continuance:

And also, I believe, after realizing that – that there are seven minutes missing out of the tape – And let me explain – (inaudible) security video thing is from a home security system where there are different cameras. And that had just been

installed by a security person who was in the employ of – alleged victim –

Court: Okay.

Ms. Powers: The – police did not – obtain those – those videos right away. In fact the security person is the one – the employee of the – victim, -- the person who extracted the video and then gave it to the police a number of days – now I can't remember if it was a week or two weeks – later.

So we have all sorts of authentication problems. We also have – (inaudible) seven minutes is missing –

Female: (perhaps Ms. Alumbaugh, attorney for co-defendant Tellvik) I need an expert.

Ms. Powers: I understand. This is a lot of money, and – Mr. Bueschel (assisted Ms. Alumbaugh) is (inaudible) – I have a lot of nerve to ask – for money.

I – I – looked all over the place for an expert –

Court: All attorneys have a lot of nerve. That's their job. They're supposed to have a lot of nerve.

Ms. Powers: And I don't think I've ever been accused of not having –

The Court: -- you're supposed to do; stand up for your client's rights.

Ms. Powers: And – and I looked, you know, and the going rate is actually \$500 an hour. This – unbelievable. And this particular person does give a public defense discount for \$199 –

The Court: Sounds like a marketing ploy to me –

Ms. Powers: -- (inaudible) \$199, you know, a bargain. But at \$300 -- less expensive than other folk that I have been trying to secure, and so that's why, you know, I -- I got this information early April, and I've been looking for experts and finally found one, and so -- and then we had this trial, the motion to continue to May--

The Court: I don't understand the materiality, relevance of -- the gap. Is there something that happened on the gap that --
(emphasis added)

Ms. Powers: Well, there -- we don't know. There could be --
(emphasis added)

The Court: Well, --

Ms. Powers: The sequence -- the sequence -- and that's what I need an expert for -- is that -- the -- the gap on this -- video purports to show the defendants doing various things, mostly trying to dig their way out of the snow and move their car. But -- there are -- there are some enhancement that might need to be done. There are some allegations of a gun. And so I need -- I need --

The Court: Let me ask -- let me ask Ms. Hooper, is the video something that the state's going to be wanting to play at trial?

Ms. Hooper: (DPA) Absolutely. Oh, yes --

The Court: And does it show --

Ms. Hooper: --exactly. And it shows Mr. Tellvik dropping a gun right in the snow there, -- RP 7-9.

While disputing what the video shows Mr. Tellvik doing, Mr. Bueschel indicates that they too want the video shown so that each side could argue its theory of the case.

After having heard from Mr. Bueschel, the court stated: The reason that I asked is because I'm going to have to rule on whether Pay \$7,000 to an investigator. And I don't see why the court should do that right now. So, -- " (emphasis added). RP 7-10. And then after some further exchange with Mr. Bueschel, continues, "So, I'm going to deny the motion for the expert." RP 11.

A complete reading of the exchange between the court and counsel shows that the court was open to persuasion by counsel and that while money was discussed, it was not the basis of the court's denial. To the contrary, the court clearly indicated that its decision not to agree to pay an investigator was not based on the amount requested, but rather the lack of any articulation establishing materiality.

2. AS APPELLANT PECK CANNOT SHOW THAT THE AUTHORIZATION FOR A DEFENSE FORENSIC MEDIA EXPERT WAS NECESSARY, THE TRIAL COURT'S DENIAL OF SUCH DOES NOT RISE TO THE LEVEL OF CONSTITUTIONAL MAGNITUDE.

Having failed to establish the materiality of his request, defendant cannot now allege that the court's denial of his motion is of constitutional magnitude.

Subsequent to the trial court's denial of Mr. Peck's motion, but prior to trial, the court heard testimony regarding the video from both Corporal Green (who had initially responded to the scene with Deputy Kivi), and Deputy Martin who had put the different feeds into a sequential format. After hearing their testimony, and having had the opportunity to cross-examine the two men, Mr. Peck did not renew his motion.

Whether expert services are necessary for an indigent defendant's adequate defense is within the discretion of the trial court, and its decision will not be overturned absent an abuse of discretion. *State v. Cuthbert*, 154 Wn.App. 318, 225 P.3d 407, review denied 169 Wn.2d 1008, 234 P.3d 1173 (2010). *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007) (cites omitted). .

3. APPELLANT PECK CANNOT SHOW
THAT THE ADMISSION OF EXHIBIT
PLAINTIFF'S EX. 30 DETRIMENTALLY
CONTRIBUTED TO THE JURY'S
VERDICT.

Even if the appellate court holds that the trial court abused its discretion when it denied services, it will not reverse defendant's conviction absent a showing of substantial prejudice. *State v. Stamm*, 16 Wn.App. 603, 605, 559 P.2d 1 (1976), *State v. Mines*, 35 Wn.App. 932, 935, 671 P.2d 273 (1983), *review denied*, 101 Wn.2d 1010 (1984).

Contrary to his assertion, the relevance of Plaintiff's Ex. 30 is not synonymous with the speculative materiality of the seven missing minutes of video. Appellant Peck can make no showing, and thus no conceivable argument that Plaintiff's Ex. 30 either omitted exculpatory evidence or created inculpatory evidence.

Mr. Peck claims that Plaintiff's Ex. 30 was prejudicial because by viewing it, law enforcement conducted additional investigation which led to the discovery of the gun buried by Mr. Tellvik. As all relevant evidence is prejudicial, the rules only require that it not be unfairly prejudicial.

The video in this case showed the defendant and Mr. Tellvik driving on Ms. Poulter's property. It showed Mr. Tellvik knocking on Ms. Poulter's front door, ringing the bell, and peeking in through the upper door window. It showed Mr. Tellvik using a pry bar to break into her shop. It showed Mr. Tellvik dropping two items into the snow and attempting to cover those items with snow with his foot. It did not show either man entering any of the buildings, or either man taking either the car battery or the bag of tools from the shop.

What the surveillance video did show to Mr. Peck's detriment was his presence on Ms. Poulter's property which led to her immediate contact with law enforcement and their immediate response to her property. Additionally the video showed behavior by Mr. Tellvik which sent law enforcement back out to the property where they were able to retrieve Mr. Green's missing Kel-Tec PF-9 mm firearm.

What was prejudicial to Mr. Peck were the circumstances in which law enforcement found him. At 1 a.m. in late January, he was the passenger in a stolen truck with a broken window, with a screwdriver in its ignition, "lost" in rural Ellensburg with a GPS unit and two cell phones in the vehicle with the lights of

Ellensburg in one direction, and the interchange where the casino was located in the other. He claimed ownership of items which the victim identified as hers at the scene and said had been stored in the shop where the door was found damaged. He presented dubious far-fetched testimony about taking the battery and tools with him should the vehicle that he and Mr. Tellvik were in should break down.

What Plaintiff's Ex. 30 was, was relevant evidence which corroborated what those present later at the scene had observed and/or knew, *e.g.*, their contact with the defendants, the driving around the property by the defendants prior to being stuck as evidenced by the tire tracks, the dropped pry bar located on the night in question where the video later showed it had been dropped, the gun being dropped where it was later recovered. It is hard to even conceive what inculpatory evidence could have been manipulated or exculpatory evidence omitted when the truth is that Mr. Tellvik and Mr. Peck were caught "red handed", due solely to Ms. Poulter's wish to show a friend her new surveillance system.

**B. WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
APPELLANT PECK'S CrR 3.6 MOTION TO
SUPPRESS HAVE NOW BEEN ENTERED AND
THIS ISSUE IS NOW MOOT.**

**CrR 3.6 Findings of Fact and Conclusions of Law on
Appellant's motion to suppress were filed July 25, 2017. CP 118.**

**C. THE TRIAL COURT DID NOT ERR IN DENYING
A MOTION TO SUPPRESS PHYSICAL
EVIDENCE, I.E., THE CONTENTS OF THE
BLACK CD CASE WHICH MR. PECK
CLAIMED NO OWNERSHIP INTEREST IN.**

Prior to removing the stolen truck from the scene, deputies conducted an inventory search of the vehicle. RP 44, 46, 103, 108, 112, 188. It was in the course of this search that the methamphetamine, digital scales, and glass pipe were found in the black cd case which had been located under the passenger seat. RP 109, 421-422, 426-431, 483, 486.

One of the narrow exceptions to the warrant requirement is a valid inventory search. Inventory searches serve many important non-investigatory purposes. Warrantless inventory searches are permissible because they (1) protect the vehicle owner's (or occupant's) property, (2) protect law enforcement agencies/officer and temporary storage bailees from false claims

of theft, and (3) protect police officers and the public from potential danger. *State v. Tyler*, 177, Wn.2d 690, 302 P.3d 165 (2013); *State v. White*, 135 Wn.2d 761, 958 P.2d 982 (1998).

Determining ownership of the vehicle is not an impoundment inventory purpose. An inventory search is permitted only to the extent necessary to achieve its purposes as stated *supra*.

This case is distinguishable from *State v. Wisdom*, 187 Wn.App. 652, 674 (2015), cited by Mr. Peck, in which Mr. Wisdom acknowledged ownership of the case in which the drugs were then located. In Mr. Peck's case, while **Mr. Peck claimed ownership of some of the items in the truck, e.g., the phones, the car battery, the bag of tools, neither man acknowledged ownership of the black cd case located under the front passenger seat despite being specifically asked. (emphasis added). RP 37, 524, 533, 592.** There were no indicators for law enforcement to assume that the case contained anything belonging to either man or that it contained contraband. **RP 108, 109, 116-117, 418, 436, 438.** Nothing in this record indicates that Mr. Peck had a reasonable expectation of privacy in the black cd case. He offered no indication that it was his personal property. **RP 37, 524.** See *State v. Kealey*, 80 Wn.App. 162, 170, 907 P.2d 319

(1995) (stating that there is a reasonable privacy interest in traditional repositories of personal belongings). While denial of ownership is not in and of itself sufficient to divest an individual of a privacy interest in an article, the court can look to the location in which the item was found. *State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007). Not only was the black cd case not claimed by Mr. Peck, but it was also within a stolen vehicle in a surreptitious location where it was not readily observable and might have been placed there by the vehicle owner. **RP 108, 418.**

V. CONCLUSION

The trial court specifically asked counsel what the materiality of the gap (*i.e.*, the missing video) was. Counsel had no answer for the court, and Mr. Peck only argues that it led to the discovery of evidence which contributed to the charges brought against him. Additionally, the contents of the black cd case were found in the course of a valid inventory search after Mr. Peck had **implicitly** denied any ownership interest. For the foregoing reasons, the State respectfully requests that the defendant's convictions in this matter be upheld.

Dated this 7th day of September, 2017.



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PROOF OF SERVICE

I, Carole L. Highland, do hereby certify under penalty of perjury that on 7th day of September, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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September 07, 2017 - 2:38 PM

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